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FILED
DISTRICT COURT OF GUAM

DEC 21 2007

JEANNE G. QUINATA
Clerk of Court

6
7 **IN THE UNITED STATES DISTRICT COURT**
8 **TERRITORY OF GUAM**

9 UNITED STATES OF AMERICA,

10 Plaintiff,

11 vs.

12 MI KYUNG BOSLEY, aka Mi Kyung Park,
13 and IN HYUK KIM, aka Dominic,

14 Defendants.

CRIMINAL CASE NO. CR07-00064

**DEFENDANT IN HYUK KIM'S
MOTION TO DISMISS INDICTMENT FOR
FAILURE TO STATE AN OFFENSE**

15
16 The Defendant IN HYUK KIM ("Kim") and a co-defendant, MI KYUNG BOSLEY
17 ("Bosley") were indicted in the instant case with the offense conspiracy to commit alien
18 smuggling. The defense understands that the government does not assert that either of the
19 defendants actually committed alien smuggling. However, actual alien smuggling is an essential
20 element of the offense.

21 The statutes cited in the indictment are as follows:

22 1. 18 U.S.C. 2 which provides:

23 (a) Whoever commits an offense against the United States or
24 aids, abets, counsels, commands, induces or procures its
25 commission, is punishable as a principal.

26 (b) Whoever willfully causes an act to be done which if
27 directly performed by him or another would be an offense
28 against the United States, is punishable as a principal.

ORIGINAL

1 The essential elements of conspiracy are as follows:

2 A person need not actually commit a crime himself in order
3 for the jury to find him guilty. A person who helps another
4 commit a crime is just as guilty as the one who actually
5 commits it.

6 The person who actually commits the crime is called the
7 principal. Those who are guilty because they helped
8 (him/her) commit it are called aiders and abettors.

9 (Ninth Circuit Manual of Model Criminal Jury Instructions, 2003).

10 In the instant case no offense was actually committed, specifically including but not
11 limited to alien smuggling. The indictment fails to state an offense because the essential elements
12 of conspiracy are not met: no actual crime was committed.

13 2. 18 U.S.C. 371 which provides:

14 If two or more persons conspire either to commit any
15 offense against the United States, or to defraud the United
16 States, or any agency thereof in any manner or for any
17 purpose, and one or more of such persons do any act to
18 effect the object of the conspiracy, each shall be fined under
19 this title or imprisoned not more than five years, or both.

20 If, however, the offense, the commission of which is the
21 object of the conspiracy is a misdemeanor only, the
22 punishment for such conspiracy shall not exceed the
23 maximum punishment provided for such misdemeanor.

24 3. 8 U.S.C. 1324(a)(1)(A)(iii), which provides:

25 Any person—who knowing or in reckless disregard of the
26 fact that an alien has come to, entered, or remains in the
27 United States in violation of law, conceals, harbors, or
28 shields from detection, or attempts to conceal, harbor, or
shield from detection, such alien in any place, including any
building or any means of transportation...shall be punished
as provided in subparagraph (B).

In order to establish alien smuggling under 8 U.S.C. 1324(a)(1)(A)(iii) the government
must prove each of the following elements beyond a reasonable doubt:

First, [alien] was an alien;

1 Second, [alien] was not lawfully in the United States;

2 Third, the defendant [knew][was in reckless disregard of the fact] that [alien] was not lawfully in
3 the United States;

4 Fourth, the defendant concealed [alien] for the purpose of avoiding [alien]'s detection by
5 immigration authorities.

6 An alien is a person who is not [a natural-born or naturalized
7 citizen][national] of the United States. An alien is not
8 lawfully in this country if [the person was not duly admitted
9 by an Immigration Officer][the person[e.g., entered the
10 United States for the purpose of performing labor]].

11 (Ninth Circuit Manual of Model Criminal Jury Instructions, 2003)

12 In the instant indictment, the government has failed to allege, and could not prove, that the
13 defendant(s) concealed an alien for the purpose of avoiding the alien's detection by immigration
14 authorities. Consequently, the indictment fails to comply with Federal Rule of Criminal
15 Procedure 7(c)(1) which provides:

16 The indictment or information must be a plain, concise, and
17 definite written statement of the essential facts constituting
18 the offense charged and must be signed by an attorney for
19 the government...

20 Defendant therefore moves to dismiss the indictment because the government has
21 failed to state an offense.

22 Dated this 20th day of December, 2007.

23 LUJAN AGUIGUI & PEREZ LLP

24 By:

25 
26 PETER C. PEREZ, ESQ.

27 Attorneys for Defendant In Hyuk Kim

28 K-0021/878-00/0878/PCP/dmg